

February 20, 2004

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Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, SW – Room TW-A325
Washington, D.C. 20554

Filed via Electronic Filing

**Re: *Ex Parte* Presentation in the Proceeding Entitled "Nationwide
Programmatic Agreement Regarding the Section 106 National Historic
Preservation Act Review Process" – WT Docket No. 03-128**

Dear Ms. Dortch:

On Tuesday, February 17, 2004, the Advisory Council on Historic Preservation ("ACHP") conducted a meeting via telephone conference of the Drafting Committee of the working group established by the ACHP known as the Telecommunications Working Group ("TWG"), to discuss issues relevant to the above-identified proceeding. The following individuals, representing the companies or associations indicated, and an official of the Commission, participated in the conference call:

Sheila Burns	Environmental Resource Management ("EMR")
John Clark –	Perkins Coie LLP – The Wireless Coalition to Reform Section 106
Valerie Hauser	
DeCarlo	ACHP
John Fowler	ACHP
Bambi Kraus	National Association of Tribal Historic Preservation Officers ("NATHPO")
Jay Keithley	PCIA – The Wireless Infrastructure Association
Betsy Merritt	National Trust for Historic Preservation
Jo Reese	Archeological Investigations Northwest, Inc. – American Cultural Resources Association ("ACRA")
Edward Sanderson	Rhode Island State Historic Preservation Officer ("SHPO")- National Conference of State Historic Preservation Officers ("NCSHPO")
Roger Sherman	Sprint Corporation

Charlene Vaughn ACHP
Andrea Williams Cellular Telecommunications & Internet Association ("CTIA")

The Commission official participating in this call was as follows:

Frank Stilwell Wireless Telecommunications Bureau ("WTB")

In this meeting, the parties discussed the document circulated to the Drafting Committee by ACHP on Friday, February 13, 2004 entitled "ACHP Revised Language for Section IV of the draft FCC Nationwide PA – February 13, 2004." ("Feb. 13 proposal") (Email transmittal and document attached as Attachment 1).

The ACHP representative opened the call and went over the six numbered points in her email to the Drafting Committee of February 13 that she said were the goals achieved by the Feb. 13 proposal. She said that the Feb. 13 proposal was intended to replace Section VI of the Nationwide Programmatic Agreement ("NPA") that is the subject of this proceeding.

The industry representatives noted that in comparing the Feb. 13 proposal to the NPRM version of Section VI of the NPA, the Feb. 13 proposal deleted the paragraph dealing with "previously disturbed ground," and made substantial changes to the provisions on archeological surveys. The industry representatives strongly objected to these proposed changes and stated that they believed that these changes appeared to be beyond the scope of the issues given to the Drafting Committee to resolve.

The ACHP representatives said that the ACHP had made these changes in their recent review of the section, and that they acted based on complaints in the comments, particularly from Indian tribes. One representative called the previously disturbed ground provision "inflammatory and unacceptable." Another ACHP representative stated that these issues were logically included in their proposal and these discussions because archeological surveys are a major component of identification under Section 106.

The FCC representative stated that the discussion about these issues was news to him and that these were a completely new set of issues. He noted that these issues were not included in the list of five discrete issues that the ACHP raised to the FCC in response to the NPRM version of the NPA.

The ERM representative stated that in some different parts of the country, consultants are rarely required to do archeological surveys, and that this was particularly true in the following two situations: (1) for sites proposed for the parking lot of a shopping

center where the ground has obviously been significantly disturbed; and (2) where there is a particularly high degree of slope to the site.

The CTIA representative questioned the time limits provided in this document and stated that industry doesn't want a situation where the SHPO could come up with a new property at the "11th hour," or late in the 30-day review period, thus potentially turning a 30-day review into a 60-day review.

The National Trust representative stated that she thought the ACHP had done an excellent job of splitting the difference between two points of view on these issues, and that "this version really works." She also noted a concern that the dispute-resolution provision lacked specificity.

The NCSHPO representative was asked if NCSHPO would approve the Feb. 13 proposal. He responded that his group had discussed the properties that applicants should be required to identify from records in the SHPO office. They had agreed that it was unreasonable to require applicants to go through hundreds of thousands of sheets of paper to identify properties, but they also thought it was reasonable to ask applicants to identify and consider properties previously identified as eligible by the SHPO, or those that the SHPO had previously evaluated as significant. He further stated that his group was not wildly enthusiastic, but that "this appears to be a reasonable list."

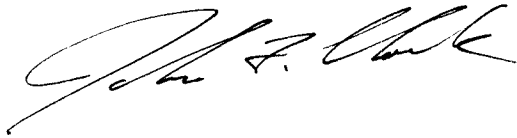
The ACHP representative stated that taking the discussion from this call into account, ACHP would prepare a new version of the proposal and distribute it to the Drafting Committee by the end of the day. She said that they had marching orders from the House Resources Committee, and that the Committee understood that the ACHP might not be able to get full sign-off from all parties, but that they were to do their best.

This letter does not purport to repeat all of the statements from all participants in this conference call, but only to summarize the main topics of discussion as required in the Commission's rules. This notice is submitted on behalf of the non-FCC parties identified above, except for the ACHP, which the Commission has ruled is exempt from compliance with the Commission's *ex parte* rules in this proceeding.

February 9, 2004

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Respectfully submitted,

A handwritten signature in black ink, appearing to read "John F. Clark". The signature is fluid and cursive, with a long horizontal stroke at the end.

John F. Clark

Counsel to the Wireless Coalition to Reform Section 106

JFC:jfc

Attachment 1

Robles, Irene-WDC

Subject: FW: ACHP Identification Proposal following the 2/12 TWG Drafting Group

-----Original Message-----

From: Charlene Vaughn [mailto:cvaughn@achp.gov]

Sent: Friday, February 13, 2004 6:15 PM

To: Alan Downer; Bobeck, Ann; Clark, John F. - WDC; Javier Marques; Jay Keithley; John Fowler; NATHPO; 'schamu@sso.org'; Valerie Hauser; Andrea Williams; Andrea Bruns; Bambi Kraus; 'Betsy Merritt'; Frank Stillwell; Jo Reese; Sheila Burns; Roger Sherman; gsmith@johnstondc.com; jmartin@usetinc.org; jfowler@erols.com

Subject: ACHP Identification Proposal following the 2/12 TWG Drafting Group meeting

Hello Drafting Committee:

I hope that this e-mail is waiting for you on Tuesday morning and that you have had a wonderful weekend.

The teleconference call-in information is as follows:

Date: Tuesday, February 17, 2004
 Time: 11:00 a.m. until 12:30 p.m. (est)
 Dial-in number: 888-387-8686
 Access No 7120435, then press #

In preparation for the teleconference, I am attaching the ACHP's revised language for *Section IV, Identification and Evaluation*, of the draft FCC Nationwide Programmatic Agreement. While we were unable to reach agreement regarding all aspects of the changes needed to streamline the identification process during Thursday's meeting, I believe that we made significant progress in certain areas. Building upon the points of agreement, John Fowler, Valerie Hauser and I prepared revised language that achieves the following goals.

1. Eliminates the need for surveys for visual effects.
2. Allows applicant to use their discretion regarding the use of qualified professionals when preparing the list of historic properties for visual effects.
3. Limits the sources to be considered when identifying historic properties within the area of potential effect for visual effects.
4. Clarifies the role of Indian tribes and Native Hawaiian organizations in the identification process for visual effects if they agree to consult with applicants.
5. Allows the SHPO/THPO to add properties to the list of identified properties for visual effects when such properties are a) located within the area of potential effect, b) included in the SHPO inventory, and c) meet the National Register criteria.
6. Allows the ACHP to have a role in the resolution of disputes regarding identification and evaluation.

There are obviously other issues that require further negotiation. However, we are hopeful that at the outset of Tuesday's teleconference such issues can be identified and the major concerns clearly articulated. Since we only have until **Thursday, February 19th** to finalize the language that will be submitted to FCC, we would like all parties to be given the opportunity to share their comments and suggest changes that advance the overall goal of improving the eligibility process for telecommunications activities.

Thanks for all the hard work you have put into this task. It has been quite challenging. Nonetheless, I

2/20/04

hope that at the end of this process we can all see the benefits of our collaboration.

Charlene

**ACHP Revised Language for Section IV of the draft FCC Nationwide PA
February 13, 2004**

IV. IDENTIFICATION AND EVALUATION

- A. In preparing the Submission Packet for the SHPO/THPO or consulting tribes or NHOs pursuant to Section VII of this Nationwide PA and Attachments 3 and 4, the Applicant shall:
1. define the area of potential effect;
 2. identify historic properties listed on or eligible for listing on the National Register of Historic Places within the area of potential effects;
 3. evaluate the historic significance of the identified properties, as appropriate; and,
 4. assess the effects of the Undertaking on Historic Properties.
- B. The Applicant, SHPO/THPO, and the Commission, as appropriate, shall apply the following standards when preparing or reviewing the Submission Packet:
1. Waiver of Review for Specific Geographic Areas.

The SHPO/THPO, consistent with relevant State or tribal procedures, may specify geographic areas in which no review is required for direct effects on archeological sites or no review is required for visual effects is required.
 2. Area of Potential Effects.
 - a. The area of potential effects for direct effects is limited to the area of proposed ground disturbance and the portion of a historic property that will be destroyed or physically altered by the Undertaking.
 - b. The area of potential effects for visual effects will be determined in the following manner:
 - i. Unless otherwise established through consultation with the SHPO/THPO and consulting tribes or NHOs, the area of potential effect for construction of new facilities is the area from which the tower will be visible:

- A. within a half mile from the tower site if the tower is 200 feet or less;
- B. within $\frac{3}{4}$ of a mile from the tower site if the tower is between 200 and 400 feet; or
- C. within 1 $\frac{1}{2}$ miles when the tower will be over 400 feet.

ii. Should the Applicant determine, or the SHPO/THPO or consulting tribes or NHOs recommend an alternate area of potential effect for visual effects, the Applicant and SHPO may:

- A. Agree to the alternative boundaries; or
- B. Refer the issue to the Commission or the ACHP for resolution, after making a good faith effort to reach a compromise.

C. Identification and Evaluation of Historic Properties for Visual Effects.

1. Applicants shall not be required to conduct surveys when identifying historic properties listed and eligible for listing on the National Register within the area of potential effects for visual effects unless it is identifying sites of religious and cultural significance to tribes.
2. Applicants shall identify historic properties listed on and eligible for listing on the National Register by reviewing the following records, which can be found within the offices of the SHPO:
 - a. properties listed in the National Register;
 - b. properties formally determined eligible for listing in the National Register;
 - c. properties in the process of being nominated to the National Register;
 - d. properties previously determined eligible as part of a consensus determination of eligibility between the SHPO and a Federal Agency or local government representing the Department of Housing and Urban Development (HUD); and
 - e. properties within the State inventory previously determined eligible by the SHPO.
3. Applicants may use the services of Qualified Professionals when identifying historic properties listed and eligible for listing on the National Register at their discretion.

4. The applicant shall provide the SHPO a proposed list of historic properties listed and eligible for listing on the National Register based on the foregoing identification steps.
 - a. Within 30 days of receipt of the list, the SHPO may identify additional properties included in the State inventory and located within the area of potential effects that the SHPO determines are eligible for listing on the National Register and such properties shall be added to the list.
 - b. The SHPO may also advise the Applicant that previously identified properties on the list no longer qualify for the National Register and such properties shall be removed from the list.
5. Concurrent with the identification of properties with the SHPO and in accordance with Section XX of this agreement, the Commission or the Applicant, as appropriate, shall consult with the appropriate Indian tribes or NHOs to identify historic properties of religious and cultural significance within the area of potential effects that may be eligible for listing on the National Register.

D. Identification and Evaluation of Historic Properties for Direct effects

1. Applicants shall consider the properties on the list created pursuant to Section IV. C when identifying historic properties, including buildings, structures, and archeological sites, within the area of potential effects for direct effects that are listed on and eligible for listing on the National Register.
2. Applicants shall conduct an archeological survey, in consultation with the SHPO/THPO and consulting tribes or NHOs in the area of potential effect for direct effects.
 - a. A person or persons meeting the Secretary's professional qualifications standards shall conduct all surveys.
 - b. An archeological survey shall not be undertaken when the undertaking is unlikely to cause effects to archeological resources. Any such determination shall be made by a Secretary-qualified archeologist in consultation with the SHPO/THPO, consulting tribes or NHOs, and other consulting parties. Disagreements regarding the necessity for an archeological survey shall be referred to the Commission or ACHP for resolution.

3. The applicant, in consultation with the SHPO/THPO or consulting tribes or NHOs, shall apply the National Register criteria (36 CFR Part 63) to properties identified within the APE that have not previously been evaluated for National Register eligibility.

E. Dispute Resolution

Where there is a disagreement regarding the identification or eligibility of a property, and after attempting in good faith to resolve the issue, the applicant may submit the issue to the Commission or refer the matter to the ACHP. The Commission or ACHP shall review the matter in accordance with 36 CFR Part 800.(4).